power and her position as the personal representative of the estate. Whether as donor and suing as such donor (and the joining of the second plaintiff as an additional plaintiff does not appear to me to have any effect at all on the application) or whether as legal personal representative of the estate together with the second plaintiff she and the second plaintiff clearly have the right to accounts from someone who either under the powers given to him or *de son tort* had acted in the management of the estate.

There will therefore be an order in terms of the summons.

I would at the same time indicate that I would not require any further arguments and if there should be an appeal from my decision, I would be prepared to certify to this effect.

*Order in terms.*

Solicitors: *Lim Cheng Ean & Co.; Cheang Lee & Ong.*

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## MARY MICHAEL v. UNITED MALAYAN BANKING CORPORATION BHD.

**[F.C. (Azmi L.P., Gill and Ali F.JJ.) November 20, 1970]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 54 of 1970]**

*Land Laws — Land charged as security for overdraft — Principal sum payable on demand — Claim for repayment of amount due including interest — Notice issued in Form 16D — Whether valid notice — National Land Code, 1965, ss. 254 and 255.*

In this case the appellant had charged certain lands to the respondents as security for overdraft facilities to the extent of $35,000 with interest thereon at 9.6% per annum. The respondents caused a notice in Form 16D of the National Land Code to be served on the appellant demanding payment of the sum of $35,971.09 being the amount due as at July 26, 1968 with interest thereon at 11%. The appellant failed to comply with the notice and the respondent thereupon brought an application for the sale by public auction of the land. The appellant at the trial opposed the application on the grounds (a) that the purported notice in Form 16D served on her and issued under section 255(1) of the National Land Code was null and void, (b) that the bank had no right to increase the rate of interest on the loan.

The High Court gave judgment ordering the land to be sold by public auction but held that only interest at 9.6% could be charged on the advance made. The chargor appealed.

**Held,** dismissing the appeal: in this case although the principal sum was payable on demand, the chargee was seeking to recover also the interest which had become due and payable and therefore the notice in Form 16D was the appropriate notice. In the circumstances the learned trial judge was right in making the order for sale.

Observations on whether chargee can include interest in the notice.

*Case referred to:-*

(1) *Eliatamby* v. *Sheik Mohamed,* [1970] 2 M.L.J. 194.

FEDERAL COURT.

*M. Segaram* for the appellant.

*Miss Thoo Chow Thye* for the respondent

**Azmi L.P.:** The United Malayan Banking Corporation Berhad, hereinafter referred to as "the bank" applied by originating summons to the High Court at Kuala Lumpur, for the sale by public auction of a piece of land fully described in the summons as to its title and situation and charged to the bank by Mary Michael, herein referred to as the chargor, as security for overdraft facilities to the extent of $35,000 with interest thereon at 9.6% per annum.

The charge was executed on 7th August 1963 in the form provided by Schedule XXIV(C) of the Land Code Cap. 138. The memorandum of charge further provides that "when the payment of any money thereby secured or intended to be secured, shall be further secured to the bank by any bill of exchange, promissory note, draft, receipt, or other instrument reserving a higher rate of interest to be paid in respect thereof than that hereinbefore covenanted to be paid such higher rate of interest shall be payable in payment of such monies . . . "

Sometime in 1967, the bank decided to recall the overdraft. On 20th August 1968, the bank caused a notice in Form 16D of the National Land Code to be sent to the chargor demanding payment of the sum of $35,971.09 being the amount due as at 26th July 1968 with interest thereon at the rate of 11% with monthly rests within the period of one month from the date of service thereof, failing which, an order for the sale of the said land would be applied for. The chargor failed to comply with the said notice, and on 17th October 1968, the bank filed this originating summons.

The chargor through her attorney opposed this application on two grounds, namely: —

(1) that the purported notice in Form 16D served on her and issued under section 255(1) of the National Land Code was null and void, and

(2) that the bank had no right to increase the interest from 9.6% per annum to 11% per annum since at no stage of the transaction had the chargor executed any bill of exchange, etc. securing or intended to secure for the payment of the money secured.

She therefore asked that the bank's application be dismissed with costs.

The learned trial judge upheld the respondent's second objection being of the view that only interest at 9.6% per annum could be charged on the advance made. He, however, dismissed the chargor's first objection and ordered that the land be sold by public auction to satisfy the sum of $35,971.09 together with interest thereon at the rate of 9.6% with monthly rests due to the bank on 26th July 1968 up to the date of payment.

In dismissing the chargor's first objection, Raja Azlan Shah J. expressed the view that though the principal sum was repayable on demand the matter did not fall under section 255 of the National Land Code because this was not a case for the repayment of the principal sum only, but also of interest. Furthermore, the sum actually advanced was more than the amount originally fixed in the memorandum of charge to be the limit. He therefore held that the bank was right in serving on the chargor the notice in Form 16D. In coming to that decision the learned judge cited a decision of Sharma J. in the case of *Eliatamby* v. *Sheikh Mohamed.*[1] It is necessary, I think, to

read the whole of sections 254 and 255 of the National Land Code. They are as follows:

"254. (1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D —

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

(2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.

(3) If at the expiry of the period specified in any such notice the breach in question has not been remedied —

(a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and

(b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter:

Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

255. (1) Where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to him within one month of the date on which the notice is served, may apply forthwith for an order for sale without being required to serve a notice in Form 16D under sub-section (1) of section 254.

(2) The provisions of sub-section (2) of section 254 shall apply to notices in Form 16E as they apply to notices in Form 16D."

It is to be observed that a notice in Form 16D applies to *any charge*, so that is can validly be used even in the case of a charge where the principal sum is payable on demand, even though Form 16E is specially designed for this purpose. This would be particularly true of a charge where the principal sum bears interest and the chargor is in default of payment of interest as stipulated in the charge. If there is no interest payable on the principal sum it is open to the chargee to give a notice outside the provisions of the Code either orally or in writing and, in the event of non-compliance with this notice, then to issue a notice in Form 16D on the ground that the chargor is in default. In other words, in the case of a charge where the principal sum is payable on demand and there is also a stipulation as regards payment of interest thereon, the chargee can apply for sale of the charged land either on the ground that the principal sum secured by the charge is payable on demand or on the ground that there has been a default in payment of interest. In either case a notice in Form 16D would be a valid notice.

A notice in Form 16E is both a notice of demand for payment as well as a notice that in default of payment within one month of the service of the notice the chargee will apply for an order of sale. This is clear from the wording of section 255(1) of the Code which says that in such a case no further notice in Form 16D is required. In other words, whereas Form 16D can be used whether or not the principal sum is payable on demand Form 16E can be used only if the principal sum is payable on demand.

In the *Eliathamby* case the charge provided for repayment of the principal sum on a specific date and for payment of interest every month on a certain date, and, in case of default in the payment of instalments due on account of interest, the whole amount then owing under the charge was to become immediately due and payable. The chargor made default. The chargee issued a notice in form 16E which is prescribed under section 255 of the National Land Code. Sharma J. held quite rightly that as the principal sum secured by the charge was not payable on demand the notice in Form 16E was bad, and therefore dismissed the application for sale. In the present case, although the principal sum was payable on demand, the chargee was seeking to recover also the interest which had become due and payable, so that a notice in Form 16D was the appropriate notice. In the circumstances Raja Azlan Shah J. was quite right in making the order for sale. I would therefore dismiss the first ground of appeal.

The next ground of appeal is that the learned judge, having held that the bank not being entitled under the law to charge increased interest, should have ordered an account to be taken between the parties to ascertain the present amount due, and also that the learned judge should not have ordered interest with monthly rests after the account has been closed by serving the notice dated 3rd August 1968. Before us counsel for the bank conceded that only simple interest should be charged after the closing of the account as at 3rd August 1968, and that she would therefore offer no objection to the taking of the accounts to ascertain the amount due. I would therefore direct that the rate of interest be at 9.6% simple interest per annum with effect from 4th August 1968 to 2nd April 1970 and that the accounts be taken between the parties to ascertain the correct amount due.

There will be no order as to costs of this appeal.

**Gill F.J.:** I concur in the judgment of the learned Lord President, but I have a few observations to make.

Had the chargee in the present case issued a notice in Form 16E, the chargor could perhaps have successfully argued that the form was inapplicable on the ground that the chargee was also including in the notice the amount of the interest due on the charge. It is to be observed that neither in section 255(1) of the Code nor in the form itself is there any mention of interest, so that if the chargee were to include it in the notice, the question would then arise as to whether this could be done under the provisions of section 62 of the Interpretation Act, 1967 on the ground that such deviation from the form has no substantial effect and is not calculated to mislead. This, however, is a question which does not fall to be decided in the present case, because the chargee here chose to issue a notice in Form 16D which, as the learned Lord President has pointed out, he was entitled to do.

Should this question come up for decision in the future, speaking for myself, I would say that it is open to a chargee to issue a notice in Form 16E in respect of the principal sum. If that sum is not paid in compliance with the notice and an order for the sale of the land is made on that ground, the court would have the power to order that any interest due on the principal sum be paid out of the proceeds of sale. Indeed section 257(1)(c) requires the court to specify the total amount due to the chargee at the date on which the order for sale is made. Of course, if the chargor pays the amount of the principal sum stipulated in Form 16E, the chargee will have to issue a further notice for the recovery of interest, in which event only a notice in Form 16D would appear to be appropriate.

**Ali F.J.:** I agree with the decision to dismiss this appeal and I also agree with everything that has been said on the matters arising. I only wish to make the following observation.

When a chargee issues a notice in Form 16D I do not think it can possibly be objected to, as was done in this case. A chargee, entitled to ask for an order of sale under section 255 of the National Land Code to which Form 16E is applicable, is not, I believe, precluded from proceeding under section 254 of the Code if he so chooses.

*Appeal dismissed.*

Solicitors: *M. Segaram & Co.; Allen & Gledhill.*

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## TAN KIM LUE v. PUBLIC PROSECUTOR

**[A.Cr.J. (Sharma J.) November 27, 1970]**

**[Malacca — Criminal Appeal No. 20 of 1970]**

*Criminal Law and Procedure — Minor offences — Fraudulent possession of property — Reasonable suspicion — Explanation of accused — Minor Offences Ordinance, 1955, s. 29(1).*

This was an appeal against the conviction of the appellant on a charge of having in his possession six car jacks which according to the charge was reasonably suspected of being stolen and in respect of which he failed to give a satisfactory account of how he came by the same.

The goods were found in the appellant's shop and he produced a witness to show that he had bought them from another shop.

**Held,** allowing the appeal: in this case in view of the unsatisfactory evidence produced by the prosecution there was no basis for calling upon the accused to enter on his defence and in any event the learned magistrate should in this case have accepted the explanation of the accused which could reasonably be true.

*Cases referred to:-*

(1) *Munusamy* v. *Public Prosecutor,* [1937] M.L.J. 93.

(2) *Queen-Empress* v. *Dhanjibhai Edulji,* I.L.R. 20 Bom. 348.

(3) *Woo Hon Weng* v. *Public Prosecutor,* (1958) 3 M.C. 143.

(4) *Arunasalam Thevar* v. *Public Prosecutor,* [1956] M.L.J. 109.

(5) *Tan Hoe Seng* v. *Public Prosecutor,* [1936] M.L.J. 272.

CRIMINAL APPEAL.

*Ting Poi Tek* for the appellant.

*Ahmad bin Haji Abdul* (Deputy Public Prosecutor) for the respondent.

**Sharma J.** (delivering oral judgment): The appellant in this case was charged under section 29(1) of the Minor Offences Ordinance for having in his possession six car jacks which according to the charge were reasonably suspected of being stolen and in respect of which he failed to give a satisfactory account how he came by the same. The only evidence produced by the prosecution was that of P.W.1, Sergeant 1176, who said he went to the shop of the appellant and at the rear of the shop discovered six jacks and that he questioned the appellant about them. He said that he suspected them to be stolen merely because the appellant could not give any satisfactory explanation as to how they came into his possession and apart from that he had no other reason whatsoever to suspect that the property in question was stolen property. Section 29(1) of the Minor Offences Ordinance 1955 reads as follows:—

"Any person who has in his possession ... anything which may be *reasonably suspected* of being *stolen* or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine not exceeding...."

The first ingredient of the offence is that the property in question must be *reasonably suspected of being stolen* and the property so reasonably suspected of being stolen should be found in the possession of the accused. I need do no better than quote from the judgment of Terrell Ag. C.J. in *Munusamy* v. *Public Prosecutor*[1] where he said:

"It is for the court to be satisfied that the circumstances were such that the police officer had grounds for suspicion that the property in the accused's possession was stolen property and that such suspicion was reasonable.

Unless those conditions can be shown to have been fulfilled the accused should not be called upon for an explanation.

The following passage from the judgment of the court in *Queen-Empress* v. *Dhanjibhai Edulji*[2] may be cited. The judgment was delivered upon an application for revision under section 35 of the Indian Police Act of 1856, upon which section 35 of the Minor Offences Enactment is based. At page 349 Jardine J. says:

'It being a penal Enactment which shifts the burden of proof of innocence at a certain point on to the accused, it has to be construed strictly. We are of opinion that before the accused can be called on to account for the property, there must be evidence amounting to proof to the satisfaction, not of the police officer or witness, but of the court, that the accused possessed or conveyed a thing, of which this may be predicated — we mean after judicial consideration of the court — *viz.* that the thing 'may be reasonably suspected of being stolen or fraudulently obtained.' This phrase is used as an adjective and unless it applies, accused ought not be called upon to account nor to be convicted....'"

The case of *Woo Hon Weng* v. *Public Prosecutor*[3] was brought to the notice of the learned magistrate by the counsel for the accused and it is surprising that he failed to consider it. In this case Rigby J. (as he then was) said:

"Now for the prosecution to succeed in a charge under this section it is incumbent upon it to satisfy the court beyond reasonable doubt:—

(1) That the police officers had grounds for suspicion at that time— and the words "at that time" are of crucial import-